Supreme Court, U.S.
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85-591

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC.,

Petitioner,

—v.—

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Section 6213(a) of the Internal Revenue Code provides, in relevant part, that no assessment of a deficiency in respect of the tax in issue and no levy or proceeding in court for its collection shall be made, begun or prosecuted until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of 90 days after such mailing, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. It further provides: ". . . [T]he making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

The question presented is whether the court of appeals has failed to follow this Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945), and this Court's implicit holding in *Laing v. United States*, 423 U.S. 161 (1976), by holding that the Taxpayer's appeal from dismissal of its action for an injunction became moot when the Taxpayer had a check of $137,763.31 delivered to the Internal Revenue Service under threat of having its assets seized by the Internal Revenue Service to satisfy the balance of an assessment that was made without first issuing a notice of deficiency.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W.C. Garcia & Associates, Inc. petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., A) is not reported. The order of the District Court (App., B) is not reported.

JURISDICTION

The order of the court of appeals (App., A) was entered on February 11, 1985. A timely petition for rehearing was denied on July 11, 1985 (App., C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6211, 6212, 6213, 6851, 6861, 6863, 7421, and 7430 of the Internal Revenue Code of 1954 (26 U.S.C.) are set out in App., F, *infra*, 8a-14a.

STATEMENT

Summary

This case was instituted by the Taxpayer in the district court to obtain an injunction in accordance with Section 6213(a), Internal Revenue Code of 1954[1], preventing the Government from collecting an income tax deficiency that was assessed without first issuing a statutory notice of deficiency. During the district court proceedings the Government refrained from collection action and an appropriate guarantee was made to the Government if the Taxpayer did not pay. While the Taxpayer was preparing its appeal to the court of appeals after being unsuccessful in the district court and with the guarantee still in existence, the Government threatened to seize the Taxpayer's assets if it did not immediately receive a check for $137,763.31 which the Government said was the amount owed on the assessment in issue. The check of $137,763.31 was mailed to the Government under protest and, among other things, the Government was informed that the check was not intended as a payment of the assessment, and that the Government should return the check if it changed its mind about seizing the $137,763.31.

In the district court the parties were only concerned about the principles governing the granting of an injunction and there was no mootness issue. The Taxpayer argued that *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), which were relied upon by the Government, were contrary to this Court's

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1 All statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) in effect for the tax year in issue.

opinion in *Laing v. United States*, 423 U.S. 161 (1976), and that *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), was misapplied in *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d at 313. *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, stand for the principle that to obtain an injunction under Section 6213(a) a taxpayer must show irreparable harm and no adequate remedy at law. The Taxpayer argued that in *Laing v. United States*, *supra*, this Court, in granting an injunction under Section 6213(a), did not mention irreparable harm or no adequate remedy at law.

After the Taxpayer filed its appeal, the Government filed its motion to dismiss the appeal as moot on the ground that the tax had been paid. The court of appeals agreed and dismissed the case.

W. C. Garcia & Associates, Inc., a corporation, (the "Taxpayer"), brought this action by filing its complaint in the United States District Court for the Northern District of California against Michael D. Sassi, District Director, Internal Revenue Service, (the "Government") to enjoin collection of the personal holding company tax for the taxable year ended November 30, 1975, illegally assessed against the Taxpayer, for the return of all assets seized and held pursuant to the assessment, and for litigation costs. The district court had jurisdiction by reason of Section 6213(a).

In 1979 the Internal Revenue Service ("IRS") assessed against the Taxpayer a deficiency in personal holding company tax in the amount of $82,833.80 for the taxable year ended November 30, 1975 (App., E). That amount has since increased due to related interest and penalties being assessed. The IRS failed to mail to the Taxpayer the notice of deficiency required by Section 6212 (App., E). Accordingly, the assessment is prohibited, illegal and void, but the Taxpayer is not allowed to file a petition for redetermination of the deficiency in the United States Tax Court because the notice of deficiency was not issued. Section 6213(a).

The position of the Taxpayer set forth in the complaint is that Congress has deemed irreparable harm *per se* the making of the assessment and the denial of access to the United States Tax Court and has deemed inadequate *per se* the legal remedy of a suit for refund after payment of the tax. Assessments that violate the notice of deficiency requirements of Section 6213(a) may be enjoined if the effect would be to prevent the Taxpayer from using the United States Tax Court.

Following a hearing held on January 18, 1984, the district court (Judge Patel) entered an order on January 27, 1984, denying the Taxpayer's application for a temporary restraining order because it appeared that there were substantial questions about the probability of success on the merits and because the Taxpayer had not shown that it was unable to pay the tax and sue for refund (App., D). At the hearing on January 18, 1984 the Government received a guarantee on the record (Transcript p. 13) for the ultimate payment of the assessment. Thereafter, pursuant to Section 6213(a), the Taxpayer filed a motion for a preliminary injunction, based on the failure of the IRS to comply with Section 6212(a) in not issuing a notice of deficiency to the Taxpayer.

On March 12, 1984, the district court denied the motion for preliminary injunction on the authority of *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), stating that the law of the Ninth Circuit is that a taxpayer is not entitled to injunctive relief under Section 6213(a) absent a showing of irreparable harm and inadequate legal remedy (App., E). The district court rejected the claim of the Taxpayer that *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, conflict with *Laing v. United States*, 423 U.S. 161 (1976), and that its exclusion from the Tax Court was irreparable injury *per se* and that a suit for refund after payment of the tax was *per se* an inadequate legal remedy (App., E).

On March 12, 1984, the Government filed a motion for summary judgment upon substantially the same grounds upon

which it had opposed the Taxpayer's motion for preliminary injunction. On May 21, 1984, the district court entered its order and judgment granting the Government's motion for summary judgment and dismissing the Taxpayer's action and complaint with prejudice (App., B).

While the Taxpayer was preparing its appeal to the court of appeals, the Government threatened to seize assets of the Taxpayer if it did not receive $137,763.31. On May 30, 1984, a remittance of $137,763.31 was sent to the IRS. The remittance was accompanied by a letter from James F. Kennedy, an attorney for the Taxpayer, to the IRS for the attention of Revenue Officer Robert Yakerson. A copy of the letter is attached as Exhibit C to the Government's "Motion to Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance." It reads, in part, as follows:

> Dear Mr. Yakerson:
>
> Enclosed is a check in the amount of $137,763.31. It is submitted under protest and only submitted because you said to me on May 24, 1984 in our telephone conversation that if you did not receive this check you would seize assets of W.C. Garcia & Associates, Inc. because of an assessment that has been made as a result of alleged personal holding company tax liability for the fiscal year ended November 30, 1975. You told me that you did not care what restrictions were placed on sending this check.
>
> You told me the total of $137,763.31 has not even been assessed, yet you still demanded that amount and if you did not receive it you would seize the assets of the taxpayer in that amount. You also said you would not send a bill for the amount prior to payment. You read amounts over the telephone but you said you did not know what some of them represented.
>
> The assessment referred to is illegal. *Perlowin* v. *Sassi*, 711 F.2d 910 (9th Cir. 1983). Therefore the collection of any amounts against the assessment is clearly improper and is subject to recourse in the courts. I told you that we

> are going to file an appeal with the Ninth Circuit Court of Appeals, but you said you still demand receiving $137,763.31. This check is not intended in any way as an admission by the taxpayer that the assessment is proper, nor is it intended by the taxpayer to be a payment of the assessment. It is only intended to prevent you from seizing assets of the taxpayer which conduct would be illegal since your assessment is illegal and such conduct would cause serious injury to the taxpayer. The remittance is not a payment in satisfaction of a tax liability, but is a deposit in the nature of a cash bond.
>
> We preserve all rights to sue you personally and to sue the United States for damages for your illegal actions. See, *Bothke* v. *Fluor Engineers and Constructors Inc., et al.*, 713 F.2d 1405 (9th Cir. 1983). If you change your mind about seizing this $137,763.31, please return it to me and you will reduce the amount of the damages.

The Taxpayer filed its appeal with the court of appeals and the Government filed a Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance. The Government's mootness argument centered on the receipt of the check of $137,763.31 which was treated by the IRS as a payment, resulting in the balance of the assessment in issue being treated as paid.

The Taxpayer filed Objections To Appellee's [Government's] Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance and a Memorandum Brief Of The Appellant W.C. Garcia & Associates, Inc., In Opposition To Appellee's Motion To Dismiss Appeal As Moot Or, In The Alternative, For Summary Affirmance. As to the mootness issue, the Taxpayer maintained that the remittance of $137,763.31 was not payment of the tax. The remittance was accompanied by the aforesaid letter from one of the Taxpayer's attorneys. The Taxpayer argued that the letter establishes that the position of the Taxpayer was that (1) the assessment was illegal and void; (2) the remittance was made

under protest in order to avoid an illegal seizure of the assets of the Taxpayer; (3) the remittance was not intended to be a payment of the illegal assessment made against the Taxpayer; and (4) the remittance was a mere deposit in the nature of a cash bond.

On February 11, 1985, the court of appeals entered an Order granting the Government's motion to dismiss the Taxpayer's appeal as moot without any hearing being held (App., A). The Order states in relevant part:

> . . . In the circumstances of this case, appellant's satisfaction of the assessed tax deficiency constituted payment of the taxes. *See Rosenman* v. *United States*, 323 U.S. 658 (1945); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980). The appeal from the dismissal of its action for an injunction against the collection of taxes is therefore moot.

On February 22, 1985, the Taxpayer filed a Petition For Rehearing—Suggestion For Rehearing En Banc.

On July 11, 1985, the court of appeals entered an Order denying the petition for rehearing and rejecting the suggestion for rehearing en banc (App., C).

The district court found that the IRS did not send the Taxpayer a notice of deficiency prior to the assessment as required by Section 6212(a) and (c) (App., E). Neither the district court nor the court of appeals found that the Taxpayer had waived any right to a notice of deficiency (App., A, B, D, and E).

REASONS FOR GRANTING THE PETITION

This case involves the construction of Section 6213(a), which provides that the assessment and collection of a deficiency in income tax may be enjoined if the notice of deficiency authorized by Section 6212(a) has not been mailed to the Taxpayer. The interpretation of Section 6213(a) by the district court, an interpretation which has thus far, escaped review, is in direct conflict with the interpretation of this section in *Laing v. United States*, *supra*, 423 U.S. 161 (1976).

The holding of the district court is based on the authority of *Cool Fuel, Inc. v. Connett*, *supra*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, *supra*, 711 F.2d 910 (9th Cir. 1983). These two cases are in conflict with *Laing v. United States*, *supra*; *Steiner v. Nelson*, 259 F.2d 853 (7th Cir. 1958); *Philadelphia & Reading Corp. v. Beck*, 676 F.2d 1159 (7th Cir. 1982); *Campbell v. United States*, 532 F.2d 1057 (6th Cir. 1976); *Rambo v. United States*, 492 F.2d 1060 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976); *Maxwell v. Campbell*, 205 F.2d 461 (5th Cir. 1953); and *Peerless Woolen Mills v. Rose*, 28 F.2d 661 (5th Cir. 1928).

1. The court of appeals' holding that the Taxpayer's remittance constituted payment of the tax is in conflict with *Rosenman v. United States*, *supra*, 323 U.S. 658 (1945). The holding is also in conflict with *Fortugno v. Commissioner*, 353 F.2d 429 (3rd Cir. 1965), *aff'g* 41 T.C. 316 (1963); *Lewyt Corp. v. Commissioner*, 215 F.2d 518 (2nd Cir. 1954); and *Charles Leich & Co. v. United States*, 329 F.2d 649 (Ct. Cl. 1964).

The court of appeals held that in the circumstances of this case, the Taxpayer's satisfaction of the assessed tax deficiency constituted payment of the tax, citing *Rosenman v. United States*, *supra*; and *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980). It therefore held that the Taxpayer's appeal from dismissal of its action for an injunction against the collection of the taxes was moot (App., A). Unfortunately, the court of

appeals gave no explanation of its holding that the tax had been paid. The two cases cited by it both held that a remittance made prior to assessment did not constitute payment of the tax.

Neither the court of appeals nor the district court has found that there was a valid assessment prior to the remittance of $137,763.31 made on May 30, 1984 (App., A, B, D, and E).

Since the IRS failed to mail a notice of deficiency, the assessment in this case is invalid under Section 6213(a). *Perlowin v. Sassi*, *supra*, 711 F.2d at 912. It is also certain that the Taxpayer has not acquiesced in the proposed deficiency and that the remittance of May 30, 1984, was not made with the intention of satisfying an asserted tax liability.

The remittance of $137,763.31 on May 30, 1984, was accompanied by a letter from James F. Kennedy, an attorney for the Taxpayer, to the IRS (*supra*, p. 5). The check of $137,763.31 was issued subject to whatever restrictions the Taxpayer chose to put on it (first paragraph, last sentence). The Taxpayer stated, among other things, that the check was being seized by the Government and asked that it be returned (last sentence).

In this case, there was neither a valid assessment nor an acquiescence in the proposed deficiency. "[T]he factors of 'contest', coupled with the fact of no assessment, are sufficient to negate 'payment.' " *Charles Leich & Co. v. United States*, *supra*, 329 F.2d at 653 (Ct. Cl. 1964). Here the remittance was made under protest and the amount remitted was only for the purpose of avoiding an illegal seizure of other assets of the Taxpayer. *Cf. Rosenman v. United States*, *supra*. The remittance was being tendered with one hand and the liability for the tax being contested with the other. *Lewyt Corp. v. Commissioner*, *supra*, 215 F.2d at 522-523 (2nd Cir. 1954); *Fortugno v. Commissioner*, *supra*, 353 F.2d at 435-436 (3rd Cir. 1965).

Neither *Rosenman v. United States*, *supra*, 323 U.S. 658, nor *Ford v. United States*, *supra*, 618 F.2d 357 (5th Cir. 1980),

the only authority cited by the court of appeals (App., A), supports the court of appeals' holding that the remittance made by the Taxpayer on May 30, 1984, constituted payment of the tax. Indeed, the holding conflicts with *Rosenman v. United States*. In *Rosenman v. United States*, the petitioners, faced with an absolute deadline for the payment of estate taxes, delivered to the IRS a check for $120,000, " 'as a payment on account of the Federal Estate Tax. . . . This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.' " *Rosenman v. United States*, *supra*, 323 U.S. at 660. The Court rejected the assertion of the Government that the tax was "paid" when the executors delivered the money and, therefore, the claim for refund was time barred. 323 U.S. at 662. It held that when the executors remitted the money to the Government, "the taxpayer did not discharge what [was] deemed [to be] a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until [the deficiency was assessed]." *Id.*

On its facts, the instant case is indistinguishable from *Rosenman v. United States*. The letter which accompanied the remittance in this case states unequivocally that the remittance was not intended to discharge what the Taxpayer deemed to be a liability. As in *Rosenman v. United States*, the remittance was made under protest. In *Rosenman v. United States*, the remittance was made solely for the purpose of avoiding penalties and interest. In the instant case, the remittance was made in order to avoid an illegal seizure of other assets of the Taxpayer. In *Rosenman v. United States*, the executors maintained that not all of the amount of the remittance was legally due. In the instant case, the Taxpayer maintained that none of the remittance was legally due. *Rosenman v. United States* held that the remittance did not become a payment prior to assessment of

the tax. In the instant case there has been no valid assessment of the tax.[2]

The published position of the Government accords with that of the courts that a deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest. Revenue Procedure 82-51, 82-2 C.B. 839 (1982).

The remittance made on May 30, 1984, was not a payment of the void and illegal assessment, but was a mere deposit in the nature of a cash bond. The court of appeals' holding that the remittance made on May 30, 1984, constitutes payment of the tax, is in conflict with *Rosenman v. United States*, *supra*, at 662; *Charles Leich and Co. v. United States*, *supra*; and *Fortugno v. Commissioner*, *supra*.[3] The holding is also in conflict with *United States v. Consolidated Edison Company of New York, Inc.*, 366 U.S. 380 (1961), holding a remittance of real estate taxes under protest and while contesting them did not result in a deduction for an accrual basis taxpayer. The Court held that the remittance, which did not admit, but specifically denied, liability for, and was not intended to satisfy, the contested assessments of real estate taxes was a

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2 *Koger v. United States*, 755 F.2d 1094 (4th Cir. 1985), concerns an injunction action becoming moot because the assessment was "paid" while the appeal was pending. 755 F.2d at 1096. Since the assessment was not paid in the instant case, *Koger v. United States* has no weight as to the mootness issue in this case.

3 The Court in *Laing v. United States*, *supra*, 423 U.S. at 183-184, n. 26, acknowledged without deciding that due process under the Fifth Amendment may also be violated where a taxpayer is denied access to a judicial determination of the validity of a tax prior to payment. See also, *Rambo v. United States*, *supra*, 492 F.2d at 1064-1065, for similar concern, but without deciding the issue.

This Court did not decide the due process issue in *Laing v. United States*, *supra*, because the case was decided on the application of Section 6213(a) in requiring an injunction. Likewise, we believe this case should be resolved under *Laing v. United States*, *supra*, and *Rosenman v. United States*, *supra*, without having to resolve the due process issue.

mere deposit in the nature of a cash bond, made to prevent seizure of the taxpayer's property during the contest and was not a payment of the taxes.

Even if the injunction issue were moot, that would not mean the entire case would be moot. See, *Murphy v. Hunt*, 455 U.S. 478 (1982); *United States v. Geophysical Corp.*, 732 F.2d 693 (9th Cir. 1984). The Taxpayer, in its complaint in the instant case, alleged that the assessment was illegal and prayed that an injunction be issued, that the Government be ordered to return all assets seized pursuant to the assessment, and that litigation costs be awarded to it pursuant to Section 7430. There has been no ruling on whether the assessment is illegal, on whether the assets that were seized should be returned and, on whether litigation costs should be awarded. If the assets are ordered returned, then litigation costs may properly be awarded. See Section 7430.

The court of appeals still should determine if the assessment is illegal and, if so, whether the return of all assets seized and held pursuant to the assessment should be returned to the Taxpayer. See, *Steiner v. Nelson*, *supra*, 259 F.2d at 858 (7th Cir. 1958). In addition, the court of appeals should then rule on whether the Taxpayer is entitled to litigation costs both of which are sought in the prayer of the complaint.

In *Murphy v. Hunt*, *supra*, 455 U.S. at 481-482 this Court found the claim to be moot once Mr. Hunt was convicted, and went on to state:

> ". . . The question was no longer live because even a favorable decision on it would not have entitled Hunt to bail. For the same reason, Hunt no longer had a legally cognizable interest in the result in this case. He had not prayed for damages nor had he sought to represent a class of pretrial detainees."

In the instant case, the court of appeals has not fully ruled on the relief sought in the prayer. At least part of the case remains alive.

2. The holding of the court of appeals also conflicts with the implicit holding in *Laing v. United States*, *supra*, 423 U.S. 161 (1976), that the tax therein had not been paid and the case had not become moot. In *Laing v. United States*, which is indistinguishable from the instant case, this Court held that the failure of the Internal Revenue Service to issue notices of deficiency in income tax and the consequent unavailability of a remedy in the Tax Court entitled the taxpayers to injunctive relief against assessments of income tax made in violation of that section, without any showing by the taxpayers of irreparable injury or inadequacy of legal remedy other than the inability of the taxpayers to contest the deficiencies in the Tax Court.

Laing v. United States, involved two unrelated taxpayers, Mr. Laing and Mrs. Hall, whose taxable years were terminated prior to their normal expiration date pursuant to the jeopardy termination provisions of Section 6851. The issue was whether the IRS, when assessing and collecting the unreported tax due after the termination of a taxpayer's taxable period, must follow the procedures mandated by Section 6861 *et seq.* for the assessment and collection of a deficiency whose collection is in jeopardy. The answer depended on whether the unreported tax due upon such a termination is a "deficiency" as defined in Section 6211(a) (423 U.S. at 163 and 164). The Government did not seriously challenge the taxpayers' conclusion that if the termination of their taxable periods created a deficiency whose assessment or collection was in jeopardy, the assessments and collections in the cases should have been pursuant to the procedures of Section 6861 *et seq.* (423 U.S. at 173). It was held that any tax owing, but unreported, after a Section 6851 termination is a deficiency whose assessment and collection are subject to the procedures of Section 6861 *et seq.*; that Section 6861(b) requires that a notice of deficiency under Section 6212 be mailed to the taxpayer within 60 days after the jeopardy assessment; that Section 6863 bars the offering for sale of property seized until the taxpayer has had an opportunity to litigate in the Tax Court; and that because the District Director failed to follow the procedures mandated by Section 6861 *et*

seq., the Section 6213(a) exception to the Anti-Injunction Act, Section 7421(a), became operative and the taxpayers' suits to enjoin collection of the taxes were not barred by the Anti-Injunction Act (423 U.S. at 184-186, n. 27).

In *Laing v. United States*, the IRS had seized more than $300,000 of Mr. Laing's money and applied a portion of it to the termination assessment of income tax in the amount of $195,985.55 made against him pursuant to the provisions of Section 6851. (423 U.S. at 165-166). The termination assessment was illegal and void since the IRS had failed to mail a notice of deficiency to Mr. Laing. *Perlowin v. Sassi*, *supra*, 711 F.2d at 912. Mr. Laing had not acquiesced in the proposed deficiency, but was contesting it, both in the action brought by him for an injunction against collection of the deficiency and in a suit for refund of the tax. (421 U.S. at 165-166, n. 6). Although the facts in *Laing v. United States*, with respect to whether the tax had been paid are basically the same as those herein, in *Laing v. United States*, the Government made no claim that the tax had been paid and the case had thus become moot. Since there was neither a valid assessment nor an acquiescence in the proposed deficiency, IRS' seizure of Mr. Laing's money and application of some of it to the termination assessment did not result in payment of Mr. Laing's tax (*Rosenman v. United States*, *supra*, 323 U.S. 658) and his case had not become moot. The holding of the court of appeals herein that the tax has been paid and the case has thus become moot conflicts, therefore, with the opposite holding implicit in *Laing v. United States*.[4]

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4 In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court addressed a question of mootness before reaching the merits of the claim. In holding that the controversy was alive, the Court stated, "This problem was present in *Dunn v. Blumstein*, 405 U.S. 330 (1972), and was there implicitly resolved in favor of the representative of the class. . . ." 419 U.S. at 400. The Court then said: "The rationale of *Dunn* controls the present case. . . ." 419 U.S. at 401. In *Pennhurst State School & Hospital v. Halderman*, ___ U.S. ___, 104 S.Ct. 900, at 918 (1984) the implicit holdings in cases on jurisdictional issues were held not to be binding on the Court. There is no jurisdictional issue in this case.

3. The holding of the district court, that the Taxpayer is not entitled to injunctive relief under Section 6213(a) absent a showing of irreparable harm and the absence of an adequate legal remedy, a holding which conflicts with *Laing v. United States*, *supra*, 423 U.S. 161 (1976), has evaded review. Review has thus far been evaded because of the remittance made under threat of seizure of the Taxpayer's assets unless the Taxpayer mailed a check for the void and illegal assessment in this case.

We do not know the number of times the Government has employed these tactics in an attempt to deny taxpayers access to the Tax Court, or to deny taxpayers a hearing on their right to an injunction under Section 6213(a) against collection of an illegal and void assessment of income tax made without prior issuance of a notice of deficiency.[5] If the order of the court of appeals dismissing the appeal in this case as moot is allowed to stand, one may expect that, at least in the Ninth Circuit, the Government will use this newly discovered device to prevent a hearing in an injunction action by merely demanding "payment" of the illegally assessed tax prior to the hearing, thus attempting to make the injunction issue moot. Since the record is silent on the point, the Government has left us to speculate why a check of $137,763.31 was demanded in May 1984 while the appeal to the court of appeals was being prepared, even though the illegal assessment was made in 1979 and even though the ultimate payment of the assessment was guaranteed.

It is reasonable to expect that, as was done in this case, the Government may continue to make assessments of income tax without having issued notices of deficiency and may continue to threaten to seize assets of taxpayers unless the taxpayers pay the illegal assessments. Taxpayers who can pay under such

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5 The latest reported decision evidencing a continuation of such tactics by the Government is *Koger v. United States*, *supra*, n.2, 755 F.2d 1094 (4th Cir. 1985). We have no way of knowing whether there are other unreported cases, such as the instant case, that also show the Government's attempt to deny injunction hearings on assessments by use of this mootness argument.

threats will be denied an injunction hearing in the Ninth Circuit because the question would become moot before the hearing could be finalized. This would then prevent taxpayers from attempting to convince the court of appeals to overrule itself in *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, as to its error in applying the principles established by this Court for granting an injunction under Section 6213(a). Such tactic would also prevent taxpayers from petitioning this Court to reverse the court of appeals in the *Cool Fuel, Inc. v. Connett* and *Perlowin v. Sassi* type cases.

By granting certiorari in this case and reversing the court of appeals on the mootness issue, this Taxpayer will be enabled to maintain before the court of appeals that *Cool Fuel, Inc. v. Connett*, *supra*, and *Perlowin v. Sassi*, *supra*, are contrary to a prior decision of this Court, *Laing v. United States*, *supra*, and misapply a prior decision of this court, *Weinberger v. Romero-Barcelo*, *supra*, concerning the correct rule of law to follow in applying equitable principles in Section 6213(a) injunction cases. Should the court of appeals not overrule its own two decisions, the Taxpayer could then seek review by this Court on the injunction issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2234

DC # CV-84-0224 MHP
Northern California

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff-Appellant,

—VS.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant-Appellee.

ORDER

Filed: February 11, 1985

Before:
SCHROEDER, FARRIS and REINHARDT, *Circuit Judges.*

Appellee's motion to dismiss this appeal as moot is granted. In the circumstances of this case, appellant's satisfaction of the assessed tax deficiency constituted payment of the taxes. *See Rosenman v. United States*, 323 U.S. 658 (1945); *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980). The appeal from the dismissal of its action for an injunction against the collection of taxes is therefore moot.

The appeal is dismissed and the case remanded to the district court with direction to vacate the orders and judgment from which the appeal was taken. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—v.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER

Filed: May 21, 1984

This matter having come on for hearing on defendant's motion for summary judgment and the Court having considered the memoranda and the record to date, and for good cause shown, it is hereby

ORDERED that defendant's motion is hereby GRANTED and plaintiff's complaint and action are hereby dismissed. Judgment shall be entered accordingly.

ORDERED this day of MAY 21 1984, at San Francisco, California.

/s/ M H PATEL
United States District Judge

ORDER

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2234

D.C. #CV-84-0224-MHP
(Northern California)

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff-Appellant,

—vs.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant-Appellee.

ORDER

Filed: July 11, 1985

Before:
SCHROEDER, FARRIS and REINHARDT, *Circuit Judges.*

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—v.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER

Filed: January 27, 1984

This matter came on for hearing on plaintiff's motion for a temporary restraining order to enjoin the Internal Revenue Service from collecting a tax assessment made against plaintiff. Based on the pleadings filed by plaintiff and arguments of counsel, the Court finds that there is no immediacy that requires it to act prior to having the matter set for a motion for preliminary injunction. The Court is not satisfied that the plaintiff could prevail on the merits because it appears there is substantial questions about the waiver and the probability of success on the merits. In addition, the plaintiff has not shown that it is unable to pay the tax and sue for a refund in district court. Accordingly, the Motion for Temporary Restraining Order is therefore denied.

ORDERED this day of JAN 27 1984, at San Francisco, California.

/s/ M H PATEL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0224-MHP

W. C. GARCIA & ASSOCIATES, INC.,

Plaintiff,

—VS.—

MICHAEL D. SASSI, District Director,
Internal Revenue Service,

Defendant.

ORDER DENYING PRELIMINARY INJUNCTION

Filed: March 12, 1984

Plaintiff has filed a motion for preliminary injunction seeking to enjoin the Internal Revenue Service ("Service") from collecting an income tax deficiency assessed against it. The court reviewed the papers filed in support of and in opposition to the motion and heard oral argument, and having considered all the foregoing makes the following order.

The Service assessed an income tax deficiency in the amount of $82,883.80 in plaintiff's income taxes for the taxable year ended November 30, 1975. The Service did not send plaintiff a notice of deficiency prior to the assessment as required by 26 U.S.C. §§ 6212(a) and (c). The Service contends that by plaintiff's execution of a Waiver of Restriction on Assessment and Collection of Deficiency in Tax, plaintiff waived any right to a deficiency notice. Plaintiff has moved to restrain the assessment and collection of the deficiencies, pursuant to 26 U.S.C. § 6213(a), based on the failure of the Service to comply

with the requirements of 26 U.S.C. §§ 6212(a) and (c). Section 6213(a) provides that any assessment or collection may be enjoined until a notice of deficiency has been issued to the taxpayer.

Plaintiff contends that pursuant to § 6213(a), it is entitled to an injunction without a showing that it has suffered an irreparable injury or that the payment of the deficiency and subsequent suit for refund constitutes an inadequate remedy at law. According to plaintiff, under the plain language of the statute, plaintiff is entitled to an injunction upon proof that the deficiency assessment was made or collection attempted prior to the issuance of a notice of deficiency by the Service.

The law of this circuit, however, is to the contrary. In *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), and *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983), this circuit held that a taxpayer is not entitled to injunctive relief under § 6213(a) absent a showing of irreparable harm and the absence of an adequate legal remedy. *Cool Fuel*, 685 F.2d at 313-14; *Perlowin*, 711 F.2d at 912. Plaintiff has alleged that its exclusion from the Tax Court is *per se* an irreparable injury. No Ninth Circuit authority supports such a contention. Nor has plaintiff shown payment of the deficiencies under protest, and subsequent suit for a refund to be an inadequate remedy of law.

Plaintiff has attempted to persuade this court that the Ninth Circuit cases of *Cool Fuel* and *Perlowin* conflict with the position of the Supreme Court in *Laing v. United States*, 423 U.S. 161 (1976). Plaintiff's argument is specious. The issue, of whether a taxpayer is entitled to injunctive relief pursuant to § 6213(a) to restrain any assessment or collection of a deficiency prior to the issuance of a notice of deficiency, was not before the Court in *Laing*. *Laing* does not discuss the equitable considerations for injunctive relief. Its silence does not justify plaintiff's reading that ordinary equitable considerations do not obtain under § 6213(a). In its 1983 decision in *Perlowin*, the Ninth Circuit considered *Laing* in another context. However, it did not see fit to read *Laing* in the manner urged by

plaintiff. Rather, it went on to reaffirm its holding in *Cool Fuel* that the taxpayer must show irreparable injury and lack of an adequate remedy at law.

Accordingly, plaintiff's motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: MAR 12 1984

/s/ M H PATEL

Marilyn Hall Patel
United States District Judge

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C.)

SEC. 6211. Definition of a Deficiency.

(a) In General.—For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, 44, and 45, the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, 44, or 45, exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * *

SEC. 6212. Notice of Deficiency.

(a) In General.—If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(c) Further Deficiency Letters Restricted.—

(1) General rule.—If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional

deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, or of chapter 45 tax for the same taxable periods, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

* * * *

SEC. 6213. Restrictions Applicable To Deficiencies; Petition To Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy

during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

(d) Waiver of Restrictions.—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

* * * *

SEC. 6851. Termination Assessments of Income Tax.

(a) Authority for Making.—

(1) In general.—If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of the tax so determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current taxable year or such preceding taxable year, or both, as the case may be, and shall cause notice of such determination and assessment to be given the taxpayer, together with a demand for immediate payment of such tax.

* * * *

(b) Notice of Deficiency.—If an assessment of tax is made under the authority of subsection (a), the Secretary shall mail a notice under section 6212(a) for the taxpayer's full taxable year (determined without regard to any action taken under subsection (a)) with respect to which such assessment was made within 60 days after the later of (i) the due date of the taxpayer's return for such taxable year (determined with regard to any extensions), or (ii) the date such taxpayer files such return. Such deficiency may be in an amount greater or less than the amount assessed under subsection (a).

* * * *

SEC. 6861. Jeopardy Assessments of Income, Estate, Gift, and Certain Excise Taxes.

(a) Authority for Making.—If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * *

SEC. 6863. Stay of Collection of Jeopardy Assessments.

(a) Bond to Stay Collection.—When an assessment has been made under section 6851, 6861, or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary, within such time as may be fixed by regulations prescribed by the Secretary, a bond in an amount equal to the amount as to which the stay is desired, condi-

tioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of such assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of such assessment is abated, the bond, shall, at the request of the taxpayer, be proportionately reduced.

* * * *

SEC. 7421. Prohibition Of Suits To Restrain Assessment Or Collection.

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

SEC. 7430. Awarding Of Court Costs and Certain Fees.

(a) In General.—In the case of any civil proceeding which is—

(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and

(2) brought in a court of the United States (including the Tax Court and the United States Claims Court),

the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such proceeding.

* * * *

(b) Limitations.—

* * * *

(2) Requirement that administrative remedies be exhausted.—A judgment for reasonable litigation costs shall not be awarded under subsection (a) unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service.

(3) Only costs allocable to this United States.—An award under subsection (a) shall be made only for reasonable litigation costs which are allocable to the United States and not to any other party to the action or proceeding.

(4) Exclusion of declaratory judgment proceedings.—

(A) In general.—No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.

(B) Exception for section 501(C)(3) determination revocation proceedings.—Subparagraph (A) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

* * * *

(c) Definitions.—For purposes of this section—

* * * *

(2) Prevailing party.—

(A) In general.—The term "prevailing party" means any party to any proceeding described in subsection (a) (other than the United States or any creditor of the taxpayer involved) which—

(i) establishes that the position of the United States in the civil proceeding was unreasonable, and

(ii)(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented.

(B) Determination as to prevailing party.—Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made—

(i) by the court, or

(ii) by agreement of the parties.

* * * *